IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-560

FIRST NATIONAL BANK OF FAIRBANKS,
Petitioner,

v.

WILLIAM B. CAMP,
Comptroller of the Currency of The United States,
and
THE FIRST NATIONAL BANK OF ANCHORAGE,
Respondents.

REPLY OF PETITIONER TO THE BRIEFS IN OPPOSITION

This reply is necessary to set the record straight on two particularly misleading statements in the briefs in opposition.

A. The respondents have improperly and inaccurately stated that the issue with respect to the Comptroller's failure

to issue findings or render an opinion was not raised by petitioner in the courts below[1] or in the complaint.[2]

From the inception of this litigation, petitioner has consistently contended that the failure of the Comptroller to render an opinion explaining the grounds or the basis for his approval of the branch application was arbitrary and capricious and in violation of administrative due process. Our complaint said so in almost exactly these same terms.[3] Furthermore, the issue as thus raised was met head-on by Judge John Lewis Smith, Jr. who disposed of this issue in his memorandum opinion by stating (See Pet., App. B7-8):

> As further grounds for requesting this Court to set aside the Comptroller's approval of the FNB Anchorage application, plaintiff claims that the Comptroller arbitrarily and capriciously violated its rights to administrative due process (1) in approving the branch for reasons not made public . . .
>
> The clear weight of authority holds that the Comptroller in considering branch bank applications, is not subject to the hearing procedures found in the Administrative Procedure Act, 5 U.S.C. §§554-557, and that the same considerations which led Congress to exempt him from

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[1] Comptroller's brief at 6-7.

[2] FNB Anchorage's brief at 11.

[3] See Complaint particularly subparagraphs 5(d), 5(e) and paragraphs 12 and 14. The full complaint is reprinted at pp. 5-15 of the Joint Appendix in the court below.

> the necessity of holding a formal adversary hearing also excused him from filing written opinions expressing his reasons for approval or denial . . .

On appeal, we again squarely raised this issue, arguing in the brief (p. 60) as follows:

> Further, in connection with due process, we think it no real answer to observe that §36(c) contains no express provisions requiring the Comptroller to issue an opinion or make his reasons public. As noted at the outset of this brief (p. 5, *supra*), four years prior to the hearing in this case the Comptroller's Chief Counsel had publicly stated that action had been instituted to make the issuance of opinions in contested cases a general practice. The application here was not only contested but was initially denied by the Comptroller after a careful study of all of the information before him. To then reverse himself – with nothing materially new before him – without submitting any opinion, making any findings or explaining in any way, the factual or legal basis relied upon – was manifestly arbitrary, capricious, and unlawful. [footnote omitted]

Indeed, the Comptroller showed his full awareness of this history in a motion filed on October 24 with the D.C. Circuit seeking summary reversal of the district court in *Wood County Bank v. Camp.*[4] That motion's use of our

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[4] D.C.D.C., No. 1277-72, decided October 3, 1972, and cited at page 22 of our petition for certiorari. There a bank charter case (continued)

case is in direct contradiction, and cannot be reconciled, with the Comptroller's assertions here, as may readily be seen from the motion itself:

> 2. The district court opinion is patently wrong and in conflict with prior precedent holding that the Comptroller need not publish an opinion in support of his determination.
>
> In *First National Bank of Fairbanks v. Camp*, 326 F. Supp. 541, 545 (D.D.C.), aff'd, (C.A. D.C., No. 71-1367, June 7, 1972), the district court held that:
>
> > The clear weight of authority holds that the Comptroller in considering branch bank applications is not subject to the hearing procedures found in the Administrative Procedures Act, 5 U.S.C. 554-557, and that the same considerations which led Congress to exempt him from the necessity of holding a formal adversary hearing also excuse him from filing written opinions expressing his reasons for approval or denial.
>
> The same issue was raised on appeal. In affirming, this Court did not expressly discuss the issue of written opinions, but rejected "all

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[4] (continued) was ordered remanded to the Comptroller for failing to issue findings, the court declaring that it "was not going to guess at those reasons which may have governed the Comptroller's approval."

> procedural and substantive grounds raised by the appellants." . . .[5]

Despite the foregoing urgings, the D.C. Circuit denied the Government's motion in *Wood County* in a *per curiam* order issued on December 8, 1972 and sent the record back to the district court so that it could complete the remand plans it originally ordered. The Government's brief omits any reference whatsoever to *Wood County* yet it presents the identical issue of the failure of the Comptroller to issue findings and an opinion, and also indicates a contradictory approach to this question by the same court of appeals to which we here seek certiorari.

The importance of this issue is further highlighted by the disclosure that the Government is now seeking certiorari to the Fourth Circuit in *Pitts v. Camp.*[6] This case, as we pointed out in our petition (pp. 21-23), is the most recent of the cases in which the courts have simply refused to let the Comptroller continue to get away with failing to render findings and an opinion. That is the basic underlying issue in *Pitts* and thus, despite the Government's disclaimer, there *is* a direct conflict between the result in our case and the result in *Pitts*. Accordingly, this Court now has the opportunity to resolve this fundamental question and end a substantial amount of litigation by a *per curiam* reversal.

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[5] At pp. 3-4 of the Government's "Motion for Summary Reversal or a Stay Pending Appeal of the Remand Provisions of the District Court's Order", filed October 24, 1972, in *Wood County Bank v. Camp, et al.*, No. 72-2016, D.C. Cir.

[6] 463 F.2d 632. On petition for certiorari *sub. nom. Camp v. Pitts*, No. 72-864, Oct. term 1972.

B. Both respondents contend that the Comptroller's approval of the branch application was explicitly conditioned upon designation of a distinctive name to eliminate possible confusion of names of the two "First National" banks.[7] This emphatically was not the case. The Comptroller's approval of the branch application on November 6, 1970, was unconditional (JA 160) and his letter of November 10 informing the applicant made no reference at all to any condition concerning a distinctive name (Pet. App. D., JA 13). Almost a month later, when this suit loomed, the Comptroller by letter of December 1, 1970, for the first time called FNB Anchorage's attention to the name similarity with FNB Fairbanks and required a distinctive name designation to eliminate possible confusion. FNB Anchorage responded by letter of December 18, 1970, with the "Interior City Branch" designation which the Comptroller approved by letter of December 23, 1970, which was not only more than six weeks after approving the branch application but almost a week after this suit had been filed. In the face of these facts, the contentions of both respondents are not only clearly erroneous – they unwittingly demonstrate that the Comptroller really did not consider state law as the statute requires him to do.

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[7] Comptroller's brief at 3; FNB Anchorage brief at 4.

For the reasons set out in our petition as well as those briefed herein, the petitioner prays that this Court act favorably on its petition.

Respectfully submitted,

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